3-10-1976

James F. Lewis and Thomas Glen Lewis v. American Family Insurance Group

Appellant's Brief 1976-SC-0117

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APPELLANT'S BRIEF

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SUPREME COURT OF KENTUCKY

No. 76-117

JAMES F. LEWIS
THOMAS GLEN LEWIS - - - - - Appellants

versus

AMERICAN FAMILY INSURANCE GROUP - Appellee

APPEAL FROM JEFFERSON CIRCUIT COURT
COMMON PLEAS BRANCH, THIRD DIVISION
HONORABLE E. SKILES JONES, PRESIDING

BRIEF FOR APPELLANTS

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3-10-76

It is certified that copies of this Brief have been served on the adverse party by mailing copies to Kenneth L. Anderson and to the Hon. E. Skiles Jones, the trial judge, and the Hon. Charles M. Leibson, present judge in Jefferson Circuit Court, Common Pleas Branch, Third Division, pursuant to RCA 1.250.

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STATEMENT OF QUESTIONS PRESENTED

I. Whether Indiana law should be applied to the interpretation, construction and validity of casualty insurance contracts entered into and delivered in Indiana, by and between Indiana residents, and covering automobiles registered and principally garaged in Indiana.

II. Whether Appellants are entitled to coverage under Marshall Lewis' policy:

A. The exclusion contained in Marshall Lewis' policy which precludes uninsured motorist coverage to all insureds injured while occupying an owned automobile (not qualifying as the insured automobile named in the policy declarations) is void as in derogation of the statutory requirements concerning uninsured motorist coverage; and

B. James Lewis qualified as an "insured" under Marshall Lewis' policy of insurance.

C. Appellants are entitled to medical payments under Marshall Lewis' policy.

III. Whether Appellants are entitled to uninsured motorist coverage and medical payments under James Lewis' policy on any of the following theories:

A. Appellee American Family failed to comply with the statutory regulations relative to termination of coverage; or

B. Appellee failed to comply with the policy provisions relative to termination of coverage; or

C. The representations made by Appellee's local agent, upon which the insured, James Lewis, justifiably relied, could reasonably be found to operate as a waiver or estoppel of the Appellee's ability to claim effective policy termination.

SUPREME COURT OF KENTUCKY

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v.

AMERICAN FAMILY INSURANCE GROUP - *Appellee*

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BRIEF FOR APPELLANTS

May it please the Court:

STATEMENT OF THE CASE

This appeal arises from a dispute between appellants and their insurer, American Family Insurance Group (appellee herein), as to whether appellants are entitled to recover for their serious and permanent injuries sustained in an automobile collision on July 3, 1972.

The complaint (Transcript of Record, pp. 2-5) filed by appellants alleged that they were seriously injured

due to the negligence of one Lester Turner, Jr., an uninsured motorist. The complaint further alleged that appellants were entitled to coverage under the medical payments and the uninsured motorist provisions of two policies of insurance issued by appellee. Both Lester Turner, Jr. and American Family Insurance Group, the appellee herein, were named as defendants to the suit below.

This appeal is taken from a final judgment entered on appellee's motion for summary judgment wherein appellants' claims were dismissed with prejudice (T.R., p. 14).

Appellee's motion for summary judgment as to both policies (T.R., pp. 10-11) was countered by appellants' motion for partial summary judgment against appellee establishing appellee's liability under the contracts of insurance once the negligence of Lester Turner was shown (T.R., pp. 15-16). In addition, appellants requested summary judgment against appellee for reimbursement of their reasonable medical expenses necessitated by the accident under the medical payment provisions of both policies.

All issues were extensively briefed for the Trial Court (in chronological order: Appellee's Memorandum in Support of Motion for Summary Judgment (T.R., pp. 53-57); Appellants' Memorandum in Opposition to Appellee's Motion and in Support of Appellants' Motion for Partial Summary Judgment (T.R., pp. 19-27); Appellee's Memorandum in Response to Appellants' Motion (T.R., pp. 40-51); Appellants' Reply Memorandum (T.R., pp. 76-81)). Without issuing

an opinion, or stating any grounds for the judgment, the Trial Court entered summary judgment for appellee, dismissing with prejudice appellants' claims against American Family Insurance Group. Appellants' claims against Lester Turner, Jr. are pending below. Appellants, in due time, gave Notice of Appeal, and perfected their appeal to this Court.

Appellants submit that they are entitled to summary judgment against appellee regarding the question of coverage under Marshall Lewis' policy, based on the pleadings and applicable law. Further appellants are entitled to summary judgment regarding the question of coverage under James Lewis' policy since appellee failed to comply with statutory regulations and policy provisions governing termination of liability insurance contracts; in the alternative, appellants submit that a question of fact remains as to whether appellee waived an otherwise effective termination so that summary judgment regarding James Lewis' policy is improper.

STATEMENT OF THE FACTS

Appellants James E. Lewis (hereinafter James) and Thomas Glen Lewis (hereinafter Thomas) resided with their uncle and adoptive father, Marshall N. Lewis (hereinafter Marshall) at all times relevant to this action (admitted in appellee's answer, paragraph 6 (T.R., p. 9)). The family lived at 2003 Poppy Place, Jeffersonville, Indiana. At the time of the accident James was twenty years old and owned a 1962 Chevrolet. This car had been insured by American Family

since the summer of 1970 (James' depostion, p. 4). Marshall also carried a policy of insurance issued by appellee on his private automobile. Both policies of insurance were issued through appellee's local agent, Ennis M. Roehm, 504 East Court Avenue, Jeffersonville, Indiana. Both automobiles were registered, licensed and garaged in Indiana.

Both parties agree that Marshall's policy (#13-060112-11) was in full force and effect on the date of the accident. The policy provides for uninsured motorist coverage in the amounts of $15,000 per person, $30,000 per accident; medical payments are provided in the amount of $1,000 per person. The dispute regarding Marshall's policy concerns whether the policy by its terms *excludes* coverage.

Likewise, both parties agree that James' policy (#13-060112-01) provides coverage for the appellants in amounts identical to Marshall's policy. The dispute regarding James' policy concerns whether the policy was in full force and effect as of the date of the accident.

The pleadings are relevant to both disputes. Appellants, in their complaint, made the following allegations (T.R., p. 3):

> "V. Plaintiffs state that the defendant, American Family Insurance Group, insured the automobile of the plaintiff, James E. Lewis, under policy No. 13-060112-01, and that said policy was in full force and effect at all times herein mentioned, and that said policy contained a Medical Payments provision, as well as an Uninsured Motorist provision.

> "They further state that they were residents in the home of their uncle and adopting father, Marshall N. Lewis, at all times mentioned herein, and that the said Marshall N. Lewis was also insured with the defendant, American Family Insurance Group, under policy No. 13-060112-11, which policy was in full force and effect at all times herein mentioned, and that said policy contained a Medical Payment provision, as well as an Uninsured Motorist provision, and that *these plaintiffs, by the terms and definitions of the policies mentioned above, are covered for their losses sustained in the accident described above.* (Emphasis added)."

To which appellee, in its answer, responded as follows (T.R., pp. 8-9):

> "5. Denies the first literary paragraph of paragraph V in that said policy had expired at said time and place as referred to in said Complaint and was not in full force and effect.
>
> "6. Admits that at said time and place the Plaintiffs, James E. Lewis and Thomas Glen Lewis, were residents of the home of their uncle and adopting father, Marshall N. Lewis, at the time and place set forth in said Complaint and admits said policy of insurance and admits the terms and conditions of said policy and for *affirmative defense states that under said terms and conditions of said policy, the Plaintiffs herein are specifically excluded from the "Uninsured Motorist Insurance Provision" of said policy.* (Emphasis added)."

No amendments to either pleading were ever made or tendered.

With regard to Marshall's policy, it is appellants' position that coverage has been admitted BUT FOR the

exclusion mentioned in paragraph 6, supra. This exclusion, attached to the uninsured motorists endorsement (T.R., p. 72), reads as follows:

EXCLUSIONS

This endorsement does not apply:

(a) to bodily injury to an insured while occupying a motor vehicle (other than an "insured automobile" as defined above) owned by the named insured or a resident of his household, or through being struck by such vehicle;

The burden of establishing the applicability and the validity of this exclusion is upon the appellee; however, appellants admit that the exclusion, *if valid,* factually applies and recovery under Marshall's policy is precluded.

The pleadings themselves present a clear issue of fact as to whether James' policy was in full force and effect on the date of the accident. Appellee has never attempted to deny coverage *if* the policy was in effect as of July 3, 1972. The evidence establishes that *at some time* prior to the accident, James received a statement from appellee with a premium due date of June 9, 1972. This statement was attached as exhibit #3 to Marshall's deposition and is reproduced as Exhibit A in the Appendix to this brief. There is no evidence conclusively establishing either the date this statement was received or the date it was sent (see James' deposition, Q. 46, p. 11; Q. 70, pp. 18-19).

The appellants' depositions were taken two years after the events in question, making it difficult for them to testify precisely as to the relevant time periods. However, resolving the inferences in their favor (as must be done for summary judgment purposes), the following sequence is presented. The premium payment notice was first seen by James on the weekend prior to the accident. Since James had to work the following Monday, he requested Thomas to call the American Family agent in Jeffersonville and inform the agent that James intended to pay his premium although it would be late (James' deposition pp. 18-20). Thomas called the agent Monday morning and related the above. After checking James' file, the agent said that James could have until July 9th to pay his premium. He further assured Thomas that James would be covered in the interim (Thomas' deposition, pp. 10-14). Thomas related the substance of the above conversation to James prior to the accident (James' deposition, p. 20). James was questioned as follows by appellee's counsel:

> Q. 80. Did you ever—after that conversation with Tom, did you ever send a premium in?
> A. I never had a chance.

James never had a chance because the accident happened July 3, 1972, causing serious injuries to both boys. Since that time, American Family has maintained that James' policy was terminated as of June 9, 1972.

ARGUMENT

I. Indiana Statutory and Case Law Should be Applied to the Interpretation, Construction and Validity of Casualty Insurance Contracts Entered Into and Delivered in Indiana, By and Between Indiana Residents, and Covering Automobiles Registered and Principally Garaged in Indiana.

The laws of another state need not be specifically pleaded nor proved so long as the adverse party is given reasonable notice of their applicability, K.R.S. 422.082, K.R.S. 422.084, *Vogt.* v. *Power's Administratrix,* Ky., 291 S. W. 2d 840 (1956). Appellants have maintained that Indiana law is applicable since their initial memorandum was presented to the trial court. Appellants respectfully request this Court to take judicial notice of Indiana law, K.R.S. 422.081.

The parties to this appeal are concerned solely with questions of contract interpretation and validity. The automobile accident, a tort, did occur in Kentucky, but the liability of the appellee will attach *only* under the contract of insurance once the tort is established.

The identical question of applicable law was presented to this Court in *Allstate Insurance Company* v. *Napier,* Ky., 505 S. W. 2d 169 (1974). *Napier* involved a Kentucky automobile accident and three policies of insurance; two policies of insurance were apparently entered into by Kentucky residents and the third was entered into and to be performed in Ohio. In determining the effect to be given to each policy, this Court applied Kentucky law to the former and Ohio law to the latter:

> ". . . we are of the opinion that Ohio law is applicable rather than Kentucky law for the reason that the contract of insurance in question was entered into in the State of Ohio to be performed in the State of Ohio. p. 171."

Appellants feel that *Napier* is dispositive of the issue of applicable law; however, they would like to point out that insurance is a highly regulated business in all of the fifty states. The Kentucky regulatory scheme governing mandatory coverage and methods of termination is found in K.R.S. 304, Subtitle 20. The statute, *by its own terms,* would not apply to these policies:

> "K.R.S. 304.20-010. All contracts of casualty insurance *covering subjects of insurance resident, located or to be performed* in this state are subject to the applicable provisions of this subtitle, Subtitle 14, and to other applicable provisions of this code." (Emphasis added.)

The Indiana statutes governing coverage and methods of termination apply to all policies "delivered or issued for delivery in this state [Indiana]", I.C. 27-7-5-1, I.C. 27-7-6-2. It would be a subversion of the Indiana regulatory scheme if American Family were allowed to ignore the Indiana statutes and case law governing insurance policies they write for Indiana residents.

Appellants respectfully request this Court to apply Indiana law in determining the rights and obligations arising under these policies of insurance.

II. Appellants Are Entitled to Medical Payments and Uninsured Motorist Coverage Under Marshall Lewis' Policy.

A. THE EXCLUSION CONTAINED IN MARSHALL LEWIS' POLICY WHICH PRECLUDES UNINSURED MOTORIST COVERAGE TO ALL INSUREDS WHILE OCCUPYING AN OWNED AUTOMOBILE (NOT QUALIFYING AS THE INSURED AUTOMOBILE NAMED IN THE POLICY DECLARATIONS) IS VOID AS IN DEROGATION OF THE STATUTORY REQUIREMENTS CONCERNING UNINSURED MOTORIST COVERAGE.

Marshall's policy was in effect at the time of the accident. Appellee has denied coverage based on the following exclusion contained in the uninsured motorists endorsement:

> EXCLUSIONS
>
> This endorsement does not apply:
>
> (a) to bodily injury to an insured while occupying a motor vehicle (other than an "insured vehicle" as defined above) owned by the named insured or a resident of his household.

This exclusion, simply put, conditions an insured's protection from an uninsured motorist's negligence on the status of the particular automobile he was occupying at the time of the accident. James and Thomas would have no coverage under Marshall's policy because they were injured while occupying an automobile owned by a resident (James) of Marshall's household. The appellee has the burden of establishing the applicability and validity of this exclusion since it

limits coverage otherwise available. Appellants admit that the exclusion applies to the facts of the case; however they maintain that the exclusion *cannot* be valid in light of the statutory requirements for uninsured motorist coverage.

Indiana statutorily requires that uninsured motorist protection be provided in all policies of insurance:

> "I.C. 27-7-5-1. No automobile liability [policy] . . . shall be delivered or issued for delivery in this state, . . . unless coverage is provided therein . . . for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles . . ."

Exclusions indentical to exclusion (a) have *twice* been held violative of the Indiana uninsured motorist statute.

In *State Farm Mutual Automobile Insurance Company* v. *Robertson,* Ind., 295 N. E. 2d 626 (1973), the son of the named insured was fatally injured while riding a motorcycle owned by the named insured but not named in the policy. State Farm relied on an exclusion identical to the one upon which appellee herein relies. In the course of holding the exclusion invalid, the Court used the following language:

> "Uninsured motorist legislation is remedial in nature and should be liberally construed. . . . An attempt by the insurer to dilute or diminish uninsured motorist statute protection is contrary to public policy. . . . An uninsured motorist endorsement that contravenes the statute, is, to that extent, invalid regardless of the insurance depart-

ment's approval of it (citing the above from *Indiana Insurance Company* v. *Noble,* Indiana, 265 N. E. 2d 419 (1970)).

* * * * * *

The uninsured motorists statute is for the protection of *persons* insured thereunder... Appellee's coverage (would) afford such protection to only a fraction of such persons. . . . It, therefore, as written, does not provide the protection required. (Citing the above from *Cannon* v. *American Underwriters, Inc.,* Indiana, 275 N. E. 2d 567 (1971).

* * * * * *

It is our opinion that the trial court correctly found that (the) Exclusion . . . in the State Farm Policy issued to (plaintiff) is more restrictive than the Uninsured Motorist's coverage afforded (under the statute) and that the statute must therefore prevail over the invalid provision." At p. 629.

Vantine v. *Aetna Casualty and Surety Company,* 335 F. Supp. 1296 (N.D. Indiana, 1971) also involved injury to the named insured while riding an owned but uninsured motorcycle. Aetna relied on an exclusionary clause identical to the one upon which American Family relies. The Court, in the course of holding the exclusion invalid, held as follows:

"The clear meaning of the Indiana Statute . . . mandates coverage 'for the protection of persons insured,' a requirement which in our view must be observed *irrespective of the insured's proprietory and insurance interest in the vehicle he happens to be driving.* (Emphasis added).

* * * * * *

Defendant's exclusion in the case before us arbitrarily excludes an entire class of drivers . . . Ac-

cordingly summary judgment should be, and the same is hereby granted in plaintiffs' favor."

There are no Indiana decisions contrary to those cited above.

This Court has not yet had the opportunity to decide the validity of similar exclusions under Kentucky law. However, Kentucky law is clear that uninsured motorist protection *follows the person, not the insured automobile. Meridian Mutual Ins. Co.* v. *Siddons,* Ky., 451 S. W. 2d 831 (1970), (where the insured was injured while a pedestrian), *Allstate Insurance Co.* v. *Napier,* supra, (two automobiles insured, both policies held to provide coverage to injuries sustained in one automobile), *Kentucky Farm Bureau Mutual Ins. Co.* v. *Vanover,* Ky., 506 S. W. 2d 517 (1974), (insureds injured while riding uninsured farm tractor), *Zurich Ins. Co.* v. *Hall,* Ky., 516 S. W. 2d 861 (1974), (passenger killed while occupying automobile of a friend, passenger's father's policy held applicable).

The validity of a similar exclusion was at issue in *McNutt* v. *State Farm Mutual Automobile Insurance Company,* 369 F. Supp. 381 (W.D. Ky. 1973), aff'd., 494 F. 2d 1282 (6th Cir., 1974). Judge Charles M. Allen, relying on Kentucky law, held the exclusion invalid: "the exclusion relied upon by the insurance company here is nothing more than an attempt to thwart the purpose of the statute . . .", p. 385. Judge Allen reasoned that the intended effect of the exclusion was to prevent "stacking" of two or more policies, a purpose which has been held invalid by this Court in

relation to "other insurance" clauses, *Siddons,* supra, *Napier,* supra, *Zurich Insurance Co.* v. *Hall,* supra.

The exclusion upon which appellee relies is clearly in contravention of the Indiana uninsured motorists statute, and of the Kentucky statute if such were applicable, and therefore void.

B. JAMES LEWIS QUALIFIED AS AN "INSURED" UNDER MARSHALL LEWIS' POLICY.

The pleadings, as set out in the Statement of Facts, are relevant to this issue. Appellants alleged that they were covered for their losses sustained in the accident by the terms and definitions of both policies, Complaint, para. V (T.R., p. 3). Appellee denied coverage under James' policy, claiming that it had been terminated, (Argument III, infra). However, appellee admitted the allegations concerning Marshall's policy and

> "for affirmative defense states that under said terms and conditions of said policy, the Plaintiffs herein are specifically excluded from the 'Uninsured Motorist Insurance Provision' of said policy", Answer, para. 6 (T.R., p. 9).

The validity of the exclusion relied upon was dealt with in the preceding Argument.

An affirmative defense is in the nature of a confession and avoidance; appellee has *confessed* coverage and relied solely on exclusion (a) to *avoid* its effects. *The pleading was not styled in the alternative.* American Family has never tendered an amended answer, but has allowed the case to proceed to summary judgment

on these pleadings. Consequently, appellants maintain that any question regarding their status as "insureds" under Marshall's policy cannot now be presented.

American Family filed a memorandum in support of its motion for summary judgment with the trial court, in which counsel for appellee made the following statement:

> "Thomas and James Lewis were relatives who were residents of Marshall Lewis' household and *therefore qualified as insureds under the policy under the definition of 'insured',* but coverage was excluded under Exclusion (a) since they were occupying a motor vehicle owned by a resident of the named insured's household which did *not* qualify as an 'insured automobile' ". (T.R., p. 54) (Emphasis added).

Thereafter, appellants filed their own motion for summary with a supporting memorandum (T.R., pp. 19-27) attacking the validity of this exclusion. Appellee then filed a memorandum in response to appellants' motion (T.R., pp. 40-51). It was at this point that appellee attempted to deny coverage based on the definitions contained in the uninsured motorist endorsement. The pertinent definitions are:

> "(A) *Insured.* The unqualified word "insured" means: (1) the named insured as stated in the policy and any person designated as named insured in the declarations and, while residents of the same household, the spouse of any such named insured and relatives of either; provided, if the named insured as stated in the policy is other than

an individual or husband and wife who are residents of the same household, the named insured for the purposes of this endorsement shall be only a person so designated in the declarations;

(2) any other person while occupying an insured automobile; and

(3) any person, with respect to damages he is entitled to recover because of bodily injury to which this endorsement applies sustained by an insured under (1) or (2) above.

The insurance applies separately with respect to each named insured under this endorsement and residents of the same household, but neither this provision nor application of the insurance to more than one insured shall operate to increase the limits of the company's liability.

(B) *Relative.* The term "relative" means a person related to the named insured who is a resident of the same household, but does not include any person who, or whose spouse, owns a private passenger automobile . . . (T.R., p. 12).

James and Thomas both clearly qualify as "insureds" under (A)(1); the further defining of "relative" in (B) eliminates James as an "insured" since James was a relative who "owned a private passenger automobile". Appellants continue to maintain that the issue has been admitted by the appellee, but would offer the following grounds for ignoring the policy definition of "relative" if this Court feels that their status as "insureds" is in issue.

In the first place, the exceptional meaning given the word "relative" is not sufficiently obvious. An ordinary person reading (A) (1) would assume that James

and Thomas were covered without knowing that it was necessary to further peruse the definitions in order to discover that "relative" does not equal a relative who owns a car.

In the second place, a completely arbitrary meaning has been placed on the word "relative". To qualify as an "insured" under (A) (1) a party need only reside with, and be a relative of, the named insured. Sub (B) adds *nothing* to the requirements of (A) (1) but that the "relative" not own an automobile. This is much like saying that "relative" does not include anyone who has their own assets, or who owns a boat, plane or house, or who is under the age of five, etc.. None of these categories reasonably fit the ordinary meaning attributed to "relative".

Finally, the requirement that a relative not own a car serves no *justifiable interest of the insurer.* The policy was issued to Marshall for one set premium. The premium did not decrease when a resident relative bought a car, nor did it increase when a resident relative sold a car. A set premium is charged for the uninsured motorist endorsement regardless of how many relatives reside with the insured and regardless of the number of cars owned by the household. Nor is the definition of "relative" necessary to limit the *liability* coverage provided under the policy. The policy provides liability coverage:

1. for all consensual users of the automobile named in the declarations

and

2. for the named insured and his relatives while driving a *non-owned* automobile. Non-owned automobile is one not owned by a resident of the named-insured's household.

It can be seen that *no one* has liability coverage while driving a resident relative's automobile irrespective of any definition given the word "relative".

It should be obvious that the only purpose served by so defining "relative" is to *prevent the stacking of two or more policies* of uninsured motorist coverage. This purpose is clearly invalid, *Patton* v. *Safeco Insurance Company,* Indiana, 267 N. E. 2d 859 (1971), *Siddons,* supra. Appellants maintain that they qualify as insureds under Marshall's policy, based either upon the pleadings or upon the meaning which ought to be given to the word "relative".

C. APPELLANTS ARE ENTITLED TO MEDICAL PAYMENTS UNDER MARSHALL LEWIS' POLICY.

Marshall's policy also provided for medical payments to the named insured and resident relatives up to $1,000.00 per person. Appellee has never made any attempts to excuse or explain its failure to pay the medical expenses of the appellants. Indeed, American Family admitted that portion of the complaint in their answer (see Argument II B). Surely they don't now claim that the uninsured motorist exclusion also applies to medical payments.

This policy also attempts to reduce uninsured motorist coverage by any medical payments. Such attempts

have been held void in both Kentucky and Indiana, *Meridian Mutual* v. *Siddons,* supra, *Leist* v. *Auto Owner's Insurance Company,* Ind., 311 N. E. 2d 828 (1974).

III. Appellants Are Entitled to Uninsured Motorist Coverage and Medical Payments Under James Lewis' Policy.

A. APPELLEE FAILED TO COMPLY WITH THE STATUTORY REGULATIONS RELATIVE TO TERMINATION OF COVERAGE.

The Indiana Code defines renewal of a policy as follows:

> "I.C. 27-7-6-3. "Renewal" or "to renew" means the issuance and delivery by an insurer of a policy replacing at the end of the policy period a policy previously issued and delivered by the same insurer to the same insured, or the issuance and delivery of a certificate or notice extending the term of a policy beyond its policy period or term."

Insurers are statutorily required to renew all policies of insurance unless 20 days advance notice to the contrary is given to the insured:

> "I.C. 27-7-6-6. No insurer shall fail to renew a policy unless it shall mail or deliver to the named insured, at the address shown in the policy, at least twenty (20) days' advance notice of its intention not to renew. In the event such policy was procured by an agent duly licensed by the state of Indiana notice of intent not to renew shall be mailed or delivered to such agent at least ten (10) days prior to such mailing or delivery to the named insured unless such notice of intent is or has been waived in writing by such agent.

"This section shall not apply: (a) if the insurer has manifested its willingness to renew; nor (b) in case of nonpayment of premium: Provided, that, notwithstanding the failure of an insurer to comply with this section, the policy shall terminate on the effective date of any other insurance policy with respect to any automobile designated in both policies.

"Renewal of a policy shall not constitute a waiver or estoppel with respect to grounds for cancellation which existed before the effective date of such renewal."

Cancellation of an insurance policy is allowed if the insured fails to pay his premiums when due:

"I.C. 27-7-6-4. A notice of cancellation by an insurer of an automobile insurance policy as herein defined shall be effective only if such cancellation is for one or more of the following reasons:

(a) Nonpayment of premium which is defined to mean for the purposes of this act [27-7-6-1—27-7-6-11] the failure of the named insured to discharge when due any of his obligations in connection with the payment of premium on a policy, or any installment of such premium whether the premium is payable directly to the insurer or its agent or indirectly under any premium finance plan or extension of credit. . . ."

However, cancellation is only effective if the insurer complies with the statutory procedure:

"I.C. 27-7-6-5. No notice of cancellation of a policy to which section 4 [27-7-6-4] of this act applies shall be effective unless mailed or delivered by the insurer to the named insured at least twenty (20)

days prior to the effective date of cancellation: Provided, however, that where cancellation is for non-payment of premium at least ten (10) days notice of cancellation accompanied by the reason therefor shall be given. In the event such policy was procured by an agent duly licensed by the state of Indiana notice of intent to cancel shall be mailed or delivered to such agent at least ten (10) days prior to such mailing or delivery to the named insured unless such notice of intent is or has been waived in writing by such agent. Unless the reason accompanies or is included in the notice of cancellation, the notice of cancellation shall state or be accompanied by a statement that upon written request of the named insured, mailed or delivered to the insurer not less than fifteen (15) days prior to the cancellation, the insurer will specify the reason for such cancellation. This section shall not apply to nonrenewal.

The above statutes effectuate a strong Indiana policy (binding on all insurers issuing policies in Indiana) requiring continued coverage absent plain and timely notice to the insured of either cancellation or non-renewal:

". . . The obvious purposes (of the Statute) include the protection of automobile policy holders against termination of coverage, both before and *after the expiration* of the policy period. . . ." *American Family* v. *Ford,* Ind., 293 N. E. 2d 524 (1973) (Emphasis added).

". . . public policy demands a strict compliance with the procedure involved so that the insured, *or former insured,* may be given reasonable opportunity to make other insurance arrangements

before his old coverage is denied", *Farm Bureau Mutual* v. *Adams, Inc.*, 251 N. E. 2d 696 (1969) (Emphasis added).

Under this sort of comprehensive statutory scheme, there is no room for an insurer to argue that a policy can simply "expire" or "lapse" on a set date. The insurer must take some sort of affirmative action under either I.C. 27-7-6-5 or I.C. 27-7-6-6.

American Family had a statutory obligation to renew James' policy on June 9, 1972, unless James was given notice of its intention not to renew by May 19, 1972. *There is not one shred of evidence in this record that such notice was timely given.*

Moreover, even if such notice *were* given, American Family had an absolute obligation to renew. The insurer, by the terms of the statute, may not give notice of its intention not to renew if (a) the insurer has manifested its willingness to renew or (b) in the case of non-payment of premium. Either occurrence necessitates use of the cancellation provisions if termination is desired. In one instance estoppel operates to prevent a denial of reissue; in the other, the ultimate non-payment COULD NOT BE KNOWN 20 days in advance of its due date and cancellation would be allowed via I.C. 27-7-6-5 after ten days notice to the insured of his default.

In this instance, the Premium Notice stands as evidence of American Family's willingness to renew James Lewis' policy. Under the explicit terms of the statute, American Family could not fail to renew the policy on

June 9, 1972. On this date, the non-payment became known and the simple device of a Cancellation Notice would have terminated coverage as of June 19, 1972. No such notice was given and the coverage was still in effect on July 3, 1972. (See affidavit of James Lewis, T.R., p. 17.)

Appellants request this Court to rule, as a matter of law, that James' policy was in full force and effect as of the date of the accident.

B. APPELLEE FAILED TO COMPLY WITH THE POLICY PROVISIONS RELATIVE TO TERMINATION OF COVERAGE.

This argument is made in the event that the Court finds that James' policy could terminate on June 9, 1972 without contravening the above-cited Indiana statutes.

American Family can, by the terms of its insurance contract, impose conditions upon itself more restrictive than its statutory ability to cancel or fail to renew a policy.

The affidavit of James Lewis (T.R., p. 17) refers to a cancellation endorsement in effect at the time of the accident (T.R., p. 18). The provisions therein for cancellation are similar to the statute but the renewal provision is slightly different:

> "If the company elects not to renew this policy, it shall mail to the insured named as such in the declarations, at the address shown in this policy, written notice of such *non-renewal* not less than 20 days (30 days if the address of the named insured as

> stated in the declarations is in Illinois or 60 days if in Minnesota) prior to the termination or expiration of this policy. However, such notice shall not be required if the company has by any means manifested its willingness to renew to the named insured or representative (Emphasis added).

American Family had a contractual obligation to renew this policy unless written notice of non-renewal was mailed by May 19, 1972. No such notice was ever mailed. Appellants request the Court to rule as a matter of law that James' policy was in full force and effect as of the date of the accident.

C. THE REPRESENTATIONS MADE BY APPELLEE'S LOCAL AGENT, UPON WHICH THE INSURED, JAMES LEWIS, JUSTIFIABLY RELIED, COULD REASONABLY BE FOUND TO OPERATE AS A WAIVER OR ESTOPPEL OF THE APPELLEE'S ABILITY TO CLAIM EFFECTIVE POLICY TERMINATION.

The issue of waiver is presented merely to advise the Court that there is a factual issue making summary judgment improper IN THE EVENT THE COURT FINDS THAT THE POLICY WAS TERMINATED. Thomas Lewis has testified that appellee's Indiana agent, in response to his inquiry about the status of the policy, stated that coverage would continue until July 9, 1972. An allowable inference from this testimony is that coverage would terminate *after* that date unless the premium was paid; it can also be inferred that James relied upon this representation. As discussed at the outset, Indiana law is determinative of the waiver issue. The Indiana law is ably summar-

ized by the Seventh Circuit in *Federated Mutual* v. *Bunch,* 455 F. 2d 247 (7th Cir., 1972). Federated Mutual mailed a cancellation notice to the insured stating that cancellation would be effective in fifteen days. The accident occurred six days *after* the cancellation date. The Court held that the otherwise effective cancellation was waived via the actions of the insurer's local agents; no course of dealing was required:

> ". . . where the policy provides that any waiver of its provisions must be indorsed on the policy, such may itself be waived either by express agreement or conduct; and the fact that payment is made after an injury is sustained is immaterial *if an agent, acting with apparent authority, extends the time of payment to a point beyond the date of the injury.*
>
> * * * * *
>
> "Federated may not now rely upon any 'non-waiver' clause in the policy (p. 252).
>
> * * * * *
>
> "Mrs. Paynter reasonably believed that she was still insured; also both Federated's agent and district sales manager from their conduct implied that she was insured at least for a reasonable time until she paid the premium (p. 252).
>
> * * * * *
>
> "Appellant contends that, under Indiana law, all such conduct amounted to an extension of credit and waiver of immediate payment by Federated . . . We agree" (p. 252).

If Kentucky law were to apply, the proper place to look for that law would be in the Insurance Code (K.R.S. Chapter 304). K.R.S. 304.14-180 dealing with

agreements extending the contract, and K.R.S. 304.14-220, dealing with oral binders of insurance, would have to be interpreted in order to decide this issue. They would be the pertinent Kentucky law. However, the legislature has provided that they are *only applicable to policies issued or delivered in Kentucky,* K.R.S. 304.14-010. Appellants maintain that all questions concerning these contracts of insurance must be decided by the applicable Indiana statutes, so long as the enforcement of Indiana law does not violate any strong Kentucky public policy. Kentucky case law (*Allstate* v. *Napier,* supra) and Kentucky statutory restrictions both point to that conclusion.

In the event that this Court finds that termination of James' policy would otherwise be effective, appellants request the Court to vacate the summary judgment entered concerning this policy and to remand the case for trial on the issue of waiver.

CONCLUSION

All issues under Marshall's policy are appropriate for summary judgment. Appellants respectfully request this Court to rule that exclusion (a) is invalid as in derogation of required uninsured motorists protection, that appellants qualify as "insureds" under Marshall's policy, and that they are therefore entitled to the following:

1) their reasonable medical expenses incurred due to the accident up to $1,000.00 each

AND

2) recovery from the appellee of any damages for which the uninsured motorist Lester Turner, Jr., may be legally liable up to $15,000 each.

With regard to James' policy, the appellants respectfully request the Court to rule that the policy was in full force and effect as of the date of the accident due to appellee's failure to comply with statutory and/or policy provisions relative to policy termination and that appellants are therefore entitled to 1) and 2) above under James' policy.

In the alternative, appellants request the Court to vacate the summary judgment entered below for the reason that there remains a material issue of fact as to whether the conduct of appellee's local agent amounted to a waiver of policy termination upon which James Lewis justifiably relied.

Respectfully submitted,

JOE G. LEIBSON
515 Marion E. Taylor Bldg.
Louisville, Kentucky 40202
Counsel for Appellants

APPENDIX

EXHIBIT A

#3

AUTO POLICY

ERICAN FAMILY INSURANCE

KEEP THIS **INSURANCE PREMIUM NOTICE** WITH YOUR POLICY

LEWIS, JAMES E
2003 POPPY PL
JEFFERSONVL IN 47130

POLICY NUMBER 13 060112 01

159-569 33 CITY4Y 7

AGT. DIST TERR CLASS

	DUE DATE			PAYS TO			PREMIUM DUE	
	MO	DAY	YEAR	MO	DAY	YEAR	DOLLARS	CENTS
/30/150I-PD 62 CHEV 00MEDEXP UM	06	09	72	12	09	72	141	50

PLEASE ALSO READ OTHER SIDE OF THIS NOTICE • SEE POLICY FOR COVERAGE DATA AND AMOUNTS

AMERICAN FAMILY MUTUAL INSURANCE COMPANY – MADISON, WISCONSIN

PLEASE DETACH AND RETURN THIS STUB WITH YOUR PAYMENT

YOUR CANCELED CHECK OR MONEY ORDER RECEIPT IS YOUR EVIDENCE OF PAYMENT NO RECEIPT WILL BE SENT UNLESS REQUESTED MAIL YOUR CHECK OR MONEY ORDER PAYABLE TO

AMERICAN FAMILY INSURANCE

HOME OFFICE
MADISON, WISCONSIN 53701

REGIONAL OFFICE
ST. JOSEPH, MISSOURI 64502

IF PREMIUM EXCEEDS $20.00
USE CONVENIENT TWO-PAY PLAN

(EXCEPT FOR HOSPITAL – SURGICAL – SICKNESS – ACCIDENT POLICIES)

IF YOU PREFER YOU MAY PAY HALF OF THE AMOUNT DUE NOW (ROUNDED TO NEAREST DOLLAR), PLUS A TWO-DOLLAR HANDLING CHARGE. THE BALANCE WILL BE DUE IN 60 DAYS FROM DUE DATE. FAILURE TO PAY SUCH BALANCE, WHEN DUE, SHALL SIGNIFY YOUR INTENT TO TERMINATE THE INSURANCE. SEE OTHER SIDE FOR DETAILS

#3

FIGURE TWO-PAY PLAN HERE (EXCEPT HEALTH)

1. INSERT AMT. OF PREMIUM DUE FROM BELOW TO HERE IF YOU PAY YOUR PREMIUM UNDER TWO-PAY PLAN. $ _____ AMOUNT DUE

2. DIVIDE BY 2 = $ _____ 1/2 OF AMOUNT DUE

3. ROUND 1/2 AMT. DUE TO NEAREST DOLLAR $ .00

4. ADD HANDLING CHARGE 2.00

5. TOTAL FIRST PAYMENT DUE ON OR BEFORE DUE DATE (SHOWN BELOW) $ .00

TOTAL SECOND PAYMENT DUE IN 60 DAYS (FROM DUE DATE) IS AMOUNT IN 1., ABOVE, LESS AMOUNT IN 3., ABOVE.

LEWIS, JAMES E
2003 POPPY PL
JEFFERSONVL IN 47130

POLICY NUMBER 13 060112 01

33 7612

TERR CLASS

AGENT	DISTRICT	DUE DATE MO	DAY	YEAR	PAYS TO MO	DAY	YEAR	PREMIUM DUE DOLLARS	CENTS
159	568	06	09	72	12	09	72	141	50

DETACH AND RETURN THIS STUB WITH YOUR PAYMENT. LINE

PREMIUM TO CONTINUE INSURANCE UNDER YOUR POLICY AS DESCRIBED HEREIN IS DUE AND PAYABLE TO THE COMPANY ON OR BEFORE THE DUE DATE. PAYMENT IS CONSIDERED AS HAVING BEEN MADE UPON RECEIPT AT THE COMPANY'S HOME OR REGIONAL OFFICE AND NOT AT TIME OF MAILING.

THIS IS THE ONLY NOTICE YOU WILL RECEIVE. KEEP WITH POLICY. OR – IF THE PREMIUM IS PAYABLE BY A MORTGAGEE, PLEASE COMPLETE AND SIGN THIS FORM AND SEND IT WITH ENCLOSED ENVELOPE TO THE MORTGAGEE IMMEDIATELY.

PAID BY CHECK NO

DATE

Name of Mortgagee

I request my insurance the above named mortgagee to pay premium for the policy as per Notice on other side

X _____ Signature(s) of Insured and Date

Mail your check or money order payable to

AMERICAN FAMILY INSURANCE

HOME OFFICE
MADISON, WISCONSIN 53701

REGIONAL OFFICE
ST. JOSEPH, MISSOURI 64502